MICHAEL RODAK, JR.,

IN THE

SUPREME COURT OF THE UNITED STATES

No. 73-1634

CHICAGO, ROCK ISLAND AND PACIFIC
RAILROAD COMPANY,
Petitioner,

vs.

FRANK L. PETERMAN,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit

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Petitioner prays that this Court review a judgment of the United States Court of Appeals for the Eighth Circuit on Petition for Writ of Mandamus, which directed the vacating of an Order for a New Trial issued by Judge William C. Stuart in the United States District Court for the Southern District of Iowa, Davenport Division, on October 9, 1973.

OPINIONS DELIVERED IN THE COURTS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit filed March 15, 1974 is not yet reported. A copy of the opinion is appended.

The opinion of Judge William C. Stuart in the United States District Court for the Southern District of Iowa, Davenport Division, is not reported, and is appended.

GROUNDS ON WHICH JURISDICTION IS INVOKED

The judgment sought to be reviewed was entered in the United States Court of Appeals for the Eighth Circuit on March 15, 1974, pursuant to its opinion filed on that date. (See Appendix A). The Court directed the vacating of an Order for a New Trial issued by Judge William C. Stuart on October 9, 1973. (See Appendix B).

Timely Petition for Rehearing by Petition was denied on March 27, 1974. Jurisdiction to review the judgment below by Writ of Certiorari is conferred by 28 U.S.C. 1254. Review by this Court of the decision of the Court of Appeals for the Eighth Circuit is required because:

(a) The Court of Appeals for the Eighth Circuit has erroneously decided an important question of Federal law arising under the Federal Rules of Civil Procedure, and particularly Rule 59 thereof, which has never been previously decided or considered by this Court, and which should be here determined.

(b) The Court of Appeals for the Eighth Circuit has decided an important question of Federal law, contrary to the dissenting opinion of Justice Burger in **Jackson v. Wilson Trucking Corp.**, 243 F2d 212 (C.A. D.C. 1957), contrary to the 1966 Amendment to the Rules of Civil Procedure, and contrary to **Slaughter v. Philadelphia National Bank, et al.** (E.D. Pa. 1968); 12 Fed. R. Serv. 2nd, **Cases**, 59d.3. Thus, there is a split of authority in the Federal Courts on the question.

(c) The Court of Appeals for the Eighth Circuit has placed a narrow and restrictive interpretation upon the Federal Rules of Civil Procedure, limiting the powers of the District Courts to order a new trial in the interest of justice.

QUESTIONS PRESENTED FOR REVIEW

The question presented for review is whether or not where a party has filed a Motion for Judgment Notwithstanding the Verdict within ten days of the judgment, pursuant to Rule 59, the Trial Court may grant a new trial, and whether or not Rule 59 considered together with Rule 50 and 28 U.S.C.A. 2106 grants such power to the Trial Court and the Court of Appeals. The Eighth Circuit held that the Trial Court did not have such power, notwithstanding the 1966 Amendment to the Rules.

STATEMENT OF THE CASE

This railroad crossing accident case was tried before Judge William C. Stuart in the United States District Court for the Southern District of Iowa, Davenport Division, and resulted in a verdict for the plaintiff in the amount of $35,000.00 on July 19, 1973. In answer to special Interrogatories, the Jury found the defendant railroad was negligent, the plaintiff was contributorily negligent, which would defeat plaintiff's recovery under Iowa law, but that the defendant railroad had the last clear chance to avoid the accident.

On July 24, 1973 defendant filed a Motion for Judgment NOV, pursuant to Rule 59 of the Federal Rules of Civil Procedure, on the grounds that there was insufficient evidence to submit the doctrine of last clear chance to the Jury.

On September 11, 1973 a hearing was had on defendant's Motion, and the Court indicated to counsel that he was considering granting a new trial. He directed the parties to file Briefs on the question of a new trial.

On October 9, 1973 the Court overruled defendant's Motion for Judgment, NOV, but granted a new trial "in the interest of justice" on the grounds that his Instructions on the doctrine of

last clear chance were erroneous, and that the answer to the special interrogatories were in conflict with the general verdict.

Thereafter, the plaintiff filed a Motion to Set Aside the Order granting a new trial, and then on January 2, 1974, eighty-five days after the filing of the judgment, plaintiff filed a Petition for Writ of Mandamus to the United States Court of Appeals for the Eighth Circuit.

The Petition for Writ of Mandamus was granted by the Eighth Circuit. Briefs were filed, the case was argued; and thereafter, on March 15, 1974, the Court granted the Writ of Mandamus and directed that Judge Stuart's Order granting a new trial be set aside.

ARGUMENT

The principal issue presented to the Court is whether or not the Trial Court had the power or jurisdiction to order a new trial where the defendant had filed a Motion for Judgment NOV within ten days of the date of the judgment, where the Court had found that the answers to special Interrogatories were inconsistent with the general verdict, and where the Court on its own motion, after defendant's Motion for Judgment NOV, gave notice to the parties and an opportunity for them to be heard on whether or not a new trial should be granted.

Rule 59(d) states:

> (d) **On Initiative of Court.** Not later than 10 days after entry of judgment the court on its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party. After giving the parties notice and an opportunity to be heard on the matter, the court may grant a motion for a new trial, timely served, for a reason not stated in the motion. In either case, the court shall specify in the order the grounds therefor."

Whether or not the question is considered solely under Rule 59(d) or whether it is considered in conjunction with Rule 50 and Rule 49, the Petitioner submits that the judgment of the Court of Appeals was in error in overruling the Trial Court. Prior to the 1966 Amendment to Rule 59(d), which added the last two sentences, the weight of authority was that the Court could not order a new trial except within ten days of the date of the judgment where a party had not filed a motion requesting a new trial. All of the authorities cited by the Court of Appeals on this point, except **Lapiczak v. Zaist,** 451 F2d 79, were decided prior to the 1966 Amendment.

Even prior to the 1966 Amendment there was considerable criticism of the stringent Rule, as evidenced by the vigorous dissent of Chief Judge Burger in **Jackson v. Wilson Trucking Corp.**, 243 F2d 212. See also 71 **Harvard Law Review** (1958); 33 **Notre Dame Law Review** 126 (1957).

As noted in the Notes of the Advisory Committee, the "narrow interpretation of Rule 59(b) and (d)" made necessary the 1966 Amendment.

The Petitioner submits that the procedure followed here falls within the last two sentences of Rule 59(d) adopted in 1966. The parties were given notice and an opportunity to be heard after a motion was filed extending the time of appeal under Appellate Rule 4. The parties filed Briefs on the question raised by the Court as to whether or not it should grant a new trial. The defendant's Brief urged that the Court did have the power to grant a new trial and discussed the merits of the errors of Instruction No. 21. Although the plaintiff's Brief noted the fact that the defendant had not filed a Motion for New Trial within the ten days, it did not question the right or power of the Court to grant a new trial, but discussed instead the merits of Instruction No. 21. Thus, after the first hearing before the Court on September 11, 1973, the defendant was urging that the Court grant a new trial, and the parties had notice and an opportunity to be heard, as required by Rule 59(d). Defendant's Brief was in effect an amendment to its Motion for Judgment NOV, moving for a new trial.

Moore's Federal Practice, at ¶ 51.11 discusses this point and states that a new trial may be granted on the initiative of the Court under these circumstances where a Motion for Judgment NOV has been timely filed. Professor Moore states:

> "The time limit for a court initiated order granting a new trial, which destroys the finality of the judgment, if any has been entered, is geared to the time limits which are

imposed upon motions by the parties which have the effect of suspending the finality of a judgment and tolling the time for taking an appeal, i.e., motions under Rules 50(b), 52(b), 59(b) and (e). If, therefore, a party has made no motion which suspends the finality of the judgment and tolls the time for appeal, Rule 59(d) clearly limits the power of the court to grant a new trial to a time not later than 10 days after the entry of judgment. **But once the finality of the judgment has been suspended by a proper motion, which is pending and undecided, the last sentence of Rule 59(d), added in 1966, makes it clear that after giving the parties notice and an opportunity to be heard, the trial court has the power to grant a new trial, on its own initiative, more than 10 days after the entry of judgment for any reason for which it might have granted a new trial on motion of a party.** As we have seen prior to the 1966 amendment the great weight of authority was to the effect that the court could not grant a new trial, on its own motion, after the 10 days period, for a reason not stated in the party's motion for new trial." (Emphasis supplied.)

Professor Moore's view of the effect of the 1966 Amendment is the same as that put forward by Chief Judge Burger in his dissent in **Jackson.** Professor Moore was also a critic of the narrow interpretation of the Rule before the 1966 Amendment.

The discussion of this problem contained in **Jackson v. Wilson Trucking Corp.,** 243 F2d 212 (D.A. D.C. 1957), in both the majority and dissenting opinions, still remains the best analysis on the subject. However, the views of Justice Burger in his dissent have been misconstrued and were misconstrued by the Eighth Circuit in its opinion in this case. The Eighth Circuit states: "But even if accepted as correct the rationale suggested by Moore and the **Jackson** dissent . . . which rests upon the trial court weighing the evidence . . . does not sup-

port an affirmance here." The Eighth Circuit apparently believes that Justice Burger's views and those of Professor Moore rest upon the Trial Court weighing the evidence and finding the evidence insufficient. This is not true. In **Jackson,** the Trial Court concluded: "That the verdict was supported by the evidence" (See Footnote 3, p. 213). Justice Burger points out:

> "I agree that the trial judge can grant a new trial in response to a timely motion for judgment n.o.v. where the record warrants the entry of a directed verdict, but I find no reason for limiting or conditioning the court's discretion to cases where judgment n.o.v. could have been granted. It is the actual motion for judgment n.o.v., not the state of the record, which invokes the trial court's discretionary power to grant a new trial whether before or after ten days have elapsed from date of judgment."

Thus, it is not the weighing of the evidence or the finding that the evidence was insufficient to support the verdict that invokes the power of the Trial Court to order a new trial in these circumstances, but it is the filing of the Motion for Judgment NOV. Justice Burger further says in this regard:

> "Rule 59(d) is directed at cases where no litigant makes a motion of any kind, but when the court thinks the record does not support the verdict. In such case the trial court, without any motion **of any kind,** is for a 10 days period given power sua sponte to grant a new trial. It is only the sua sponte power which has a time limit. Rule 59(d) was not intended to apply to a situation where a motion for judgment n.o.v. is made, since as I have pointed out it is rarely if ever that a motion can be made and heard within that time limit. Furthermore, once the finality of a judgment has been suspended by a timely motion for judgment n.o.v., as occurred here, there is no sound reason why the time limitation imposed by Rule 59 should apply. 6 Moore's Federal Practice 3851, 3872-3 (2d ed. 1952)."

Where the Trial Court finds that judgment NOV should be granted, he has the clear power under Rule 50 to grant a new trial instead. All the Courts and writers concede this. Justice Burger and Professor Moore, together with the writers in the Law Review articles cited, feel that the power should not be so limited, but that the filing of a motion which suspends the finality of the judgment allows the Court, in its discretion, to order a new trial.

This was the holding of Judge Weiner in **Slaughter v. Philadelphia National Bank, et al.** (U.S.D.C., E.D. Pa. 1968), 12 FR Serv. 2d. 59d.3. Judge Weiner stated:

> "Although the instant situation is not the precise one which the 1966 amendment to Rule 59(d) sought to remedy, it is one for which Prof. Moore's paragraph, cited with approval by the Advisory Committee on Rules, holds a decided view. In line with the position taken in the treatise and now written into the Rule, Prof. Moore states:
>
> > 'the trial court may respond to a motion for judgment n.o.v. by granting a new trial instead, even after ten days have elapsed from the entry of the judgment.' "

If the Trial Court has the power in the interest of justice to grant a new trial when he could grant judgment NOV, it would seem he should also have the power to grant a new trial where he determines it in the interest of justice to overrule the judgment NOV.

The Eighth Circuit has overlooked in this case the fact that Judge Stuart specifically found, pursuant to Rule 50, that he should overrule the Motion NOV in the "interest of justice", but that he had the power under the record to do so. Judge Stuart stated:

> "It would not be fair or in the interests of justice to grant a judgment n.o.v. because of the conflict between the gen-

eral verdict and the special interrogatories, in view of the erroneous instructions given."

He, thus, overruled the Motion for Judgment NOV, and pursuant to the authority granted him under Rule 50, he may grant a new trial, as he did. All of the authorities are clear on this point.

The only case cited by the Eighth Circuit decided since the 1966 Amendment is **Lapiczak v. Zaist,** supra. That case is not in point, as the Motion for Judgment NOV was filed more than ten days after the entry of the judgment.

In **Slaughter,** Judge Weiner notes that:

> ". . . there are two convergent sources permitting us the power to grant a new trial. On the one hand, we agree with the District of Columbia Circuit, that the timely, well-grounded motion for judgment n.o.v. before us gives us a 'discretion to grant the lesser relief and to order a new trial instead if justice would thereby better be served,' Jackson, supra, at 214. On the other hand, amended Rule 59(d) has overruled the line of cases which had hitherto held that a timely post-trial motion would not toll the running of the ten-day period within which a court could grant a new trial *sua sponte* . . ." (Judge Weiner must mean the dissent in Jackson).

In addition in this case there is at least one other additional source of power and that arises under Rule 49, which considers a general verdict accompanied by answer to Interrogatories. The Rule states:

> "When the general verdict and the answers are harmonious, the appropriate judgment upon the verdict and answers shall be entered pursuant to Rule 58. When the answers are consistent with each other but one or more is inconsistent with the general verdict, judgment may be entered

pursuant to Rule 58 in accordance with the answers, notwithstanding the general verdict, or the court may return the jury for further consideration of its answers and verdict or may order a new trial. When the answers are inconsistent with the general verdict, judgment shall not be entered, but the court shall return the jury for further consideration of its answers and verdict or shall order a new trial."

It is to be noted that Judge Stuart found that there was a "conflict between the general verdict and the special Interrogatory in view of the erroneous instruction given." Thus, he had the power to grant a new trial under Rule 49. He exercised his undoubted power in overruling the Motion for Judgment NOV "in the interest of justice," and he further exercised his power in granting a new trial "in the interest of justice." To authorize a Trial Judge to grant a new trial when he could or should have sustained a Motion for Judgment Notwithstanding the Verdict, but to deny him that power when he feels that the interests of justice require overruling the Motion for Judgment NOV, is to create a different standard for the plaintiff than the defendant.

It should be noted further as pointed out in Justice Burger's dissent in Jackson, that to sustain the Trial Court's power to order a new trial in these circumstances is to avoid a circuity of action. Justice Burger stated:

"The majority holding reinstates the appellant's jury verdict. If the appellee hereafter appeals from the denial of his motion for judgment n.o.v., this court must then determine whether the evidence is legally sufficient to sustain the verdict. In that posture this court could then (a) affirm the lower court's denial of the motion for judgment n.o.v., allowing judgment on the verdict to stand, or (b) reverse the order denying judgment n.o.v. and remand for entry

> of judgment on that motion, or (c) remand under 28 U.S.C. § 2106 for a new trial, if such action be considered 'just under the circumstances.' "

That is exactly the posture of the proceedings in the instant case.

Defendant's Motion for Judgment NOV went directly to the sufficiency of the evidence of submitting last clear chance to the Jury. The errors in giving the instructions on last clear chance, which Judge Stuart found in his instructions, and also affecting the validity of the Interrogatories, were on this same point.

The plaintiff was not and could not be surprised. A post trial motion was timely filed by defendant. Plaintiff received notice that the Court was considering granting a new trial, and a hearing was had on this question. This Court should overrule the decision of the Eighth Circuit and sustain the Trial Court's power to order a new trial in these circumstances.

CONCLUSION

"The liberal rules of civil procedure must not be transformed by judicial interpretation into technical traps for the unwary". **Will v. Merrill,** 209 F2d 285.

The Petitioner submits that both logic and justice require that the Trial Court which has heard the evidence and knows all of the circumstances at first hand should not be deprived of the right to grant the lesser remedy of a new trial when a Motion of Judgment NOV has been made, if he allows the parties to be heard on the question pursuant to Rule 59(d). In fact, the result reached by the Court of Appeals may encourage Trial Judges to grant a Motion for Judgment NOV and, thus, deprive the plaintiff of a chance to re-try the question in doubtful cases where it might otherwise have granted a new trial.

This is an important question of Federal law under the Federal Rules of Civil Procedure on which there is a difference of opinion in the Federal Courts. This Court should grant certiorari.

Respectfully submitted

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APPENDIX A

United States Court of Appeals
For the Eighth Circuit

No. 74-1006

Frank L. Peterman,
Plaintiff-Petitioner,
v.
Chicago, Rock Island and Pacific Railroad Company, and Hon. W. C. Stuart, Judge, U. S. District Court for the Southern District of Iowa,
Defendant-Respondents.

On Petition for Writ of Mandamus.

Submitted: February 12, 1974

Filed: March 15, 1974

Before Gibson, Heaney, and Bright, Circuit Judges.

Bright, Circuit Judge.

Plaintiff-petitioner, Frank Peterman, recovered a judgment of $35,000 in a civil action for bodily injuries against the defendant, Chicago, Rock Island & Pacific Railroad Company (Railroad). He brings this proceeding seeking an original writ of mandamus or certiorari from this court to annul the action of the trial judge in granting defendant a new trial. Because the record demonstrates that the trial court acted without jurisdiction in entering the new trial order, we grant the writ of mandamus.

The petition presented to us alleges that the trial court "had no power, authority, or jurisdiction to enter an order granting a new trial." If established as true, this allegation furnishes a proper predicate for our review of the new trial order. A new trial order issued within the jurisdiction of the trial court is neither reviewable by appeal, **see generally Richardson v. Communications Workers of America,** 469 F.2d 333 (8th Cir. 1972), **cert. denied,** 404 U.S. 818 (1973), nor ordinarily by a mandamus proceeding, **see General Motors Corporation v. Lord,** 488 F.2d 1096 (8th Cir. 1973).[1] A new trial order, nevertheless, is reviewable where it is shown that the trial court has acted outside its jurisdiction. Such review may be through appeal, **see, e.g., Chicago and North Western Ry. v. Britten,** 301 F.2d 400 (8th Cir. 1962); certiorari, **see Demeretz v. Daniels Motor Freight, Inc.;** or mandamus, **see General Motors Corporation v. Lord,** *supra.* Accordingly, we examine the proceedings leading to the issuance of the new trial order in light of powers granted to district judges by the Federal Rules of Civil Procedure to vacate a jury verdict and order a new trial in a civil action.

Peterman's action in the federal district court sought damages against the Railroad for bodily injuries and property damages which he sustained on July 5, 1969, in a highway-railroad crossing accident. A jury returned a special verdict finding Peterman and the Railroad each guilty of "negligence which was the proximate cause of the collision," but finding further that the Railroad had the "last clear chance" to avoid the accident. Under instructions, the jury also returned a general verdict for the plaintiff assessing damages in the sum of $35,000.

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[1] Courts have permitted review of a new trial order by mandamus for a clear abuse of discretion by the trial court. **Grace Lines, Inc. v. Motley,** 439 F.2d 1028 (2d Cir. 1971); **cf. General Motors Corporation v. Lord,** 488 F.2d 1096 (8th Cir. 1972). The issue here relates to jurisdiction of the trial court, not to the exercise of its discretion.

The trial court entered judgment on the verdict on July 19, 1973. Within 10 days thereafter the Railroad filed a motion for judgment n.o.v. pursuant to Fed. R. Civ. P. 50(b). As grounds for judgment in its favor the Railroad contended that no basis existed in the evidence upon which to submit to the jury the last clear chance issue and that since the jury in its special verdict found plaintiff guilty of negligence as the proximate cause of the collision, the Railroad was entitled to a judgment of dismissal consistent with its motion for a directed verdict made at the close of all the evidence. In its motion for directed verdict, the Railroad alleged also that the giving of the last clear chance instruction constituted error because the evidence showed there was insufficient time and distance for the defendant to avoid the accident after realizing plaintiff's peril, but no claim was made that the instruction was erroneous in its form or content. Moreover, the Railroad did not file a motion for a new trial under Fed. R. Civ. P. 59, or seek a new trial as an alternate form of relief to judgment n.o.v., as is authorized by Fed. R. Civ. P. 50(b).

During the post-judgment hearing upon the n.o.v. motion held on September 11, 1973, more than 10 days after the verdict, the court, sua sponte, questioned whether the last clear chance instructions—which served to relieve plaintiff from the adverse consequences of his own contributory negligence—were erroneous in form. Thereafter, in its order dated October 9, 1973, the trial court declined to grant judgment n.o.v., holding that under the evidence a jury could have found that the train engineer saw the plaintiff in a position of danger in sufficient time to have applied the brakes and slowed the train, thus avoiding the accident.

The trial court in granting a new trial reasoned as follows:

> The viability of the last clear chance doctrine under the new statute was clearly established by the Iowa Supreme

Court in Ackerman v. James (1972), 200 N.W.2d 818. This case also treated last clear chance as an application of the law of proximate cause rather than an exception to the rule of contributory negligence.

"It would follow that if a trier of facts finds plaintiff's negligence was a proximate cause of his injury, he cannot recover." Ackerman v. James, supra at 830.

It is therefore apparent that instructions 21 and 22 contain erroneous statements of the law and that under the correct law the general verdict is contrary to the jury's answer to interrogatory number 2.

The Court is of the opinion that these instructions and the interrogatories were confusing to the jury. It would not be fair or in the interest of justice to grant a judgment NOV because of the conflict between the general verdict and the special interrogatory in view of the erroneous instructions given. More properly the jury should have been told that plaintiff could recover even if he had been negligent if defendant's negligence intervened between his negligence and the collision and became the sole proximate cause thereof. The interrogatories should have separately inquired whether plaintiff was negligent, and, if so, whether his negligence was a proximate cause of the collision.

The special verdict and the instructions, in part, are reproduced in the margin.[2]

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[2] The interrogatories contained in the special verdict returned by the jury read:

1. Was the defendant railroad company guilty of negligence which was the proximate cause of the collision and resulting injuries and damages?

Yes ___X___

No _____

The sole issue before us is whether the district court possessed the authority to grant a new trial under the circumstances. We hold that in the absence of a motion for new trial made by the defendant within 10 days under Fed. R. Civ. P. 59(b), or in the absence of an order issued by the court within 10 days under Fed. R. Civ. P. 59(d), the trial court lacked any power to sua sponte grant a new trial because of any alleged error in the instructions to the jury.

Fed. R. Civ. P. 59(b) requires that a party serve a motion for new trial "not later than 10 days after entry of judgment." Fed. R. Civ. P. 59(d) provides that "not later than 10 days after entry of judgment" the trial court "may order a new trial for any reason for which it might have granted a new trial on motion of a party." Under Fed. R. Civ. P. 59(d), as interpreted by the courts, the power of the trial court, if acting on its own initiative, is restricted to the granting of a new trial within 10 days after entry of the judgment. **Lapiczak v. Zaist,** 451 F.2d

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2. Was the plaintiff guilty of negligence which was a proximate cause of the collision and resulting injuries and damages?

Yes____X____

No _____

3. If the answer to the second interrogatory is yes, did the defendant railroad have the Last Clear Chance to avoid the collision?

Yes____X____

No _____

The court instructed on Last Clear Chance, in part, as follows:

INSTRUCTION NO. 21

Even if you have found the plaintiff, Frank L. Peterman, guilty of negligence which was a proximate cause of the collision he might still recover under the doctrine of last clear chance.

* * * * * * * *

In order for the plaintiff to recover from the defendant under this doctrine of last clear chance, the plaintiff must prove by a preponderance of the evidence all of the following propositions: (1) that at the time of and just prior to the collision, plaintiff's converted school bus was in a position of peril and

79 (2d Cir. 1971); **Chicago and North Western Ry. Co. v. Britten,** 301 F.2d 400 (8th Cir. 1962); **Tsai v. Rosenthal,** 297 F.2d 614 (8th Cir. 1961); **Demeretz v. Daniels Motor Freight, Inc.,** 307 F.2d 369 (3d Cir. 1962); **Kanatser v. Chrysler Corp.,** 199 F.2d 610 (10th Cir. 1952); **cert. denied,** 344 U.S. 921 (1953); **Freid v. McGrath,** 133 F.2d 350 (D.C. Cir. 1942); **Jackson v. Wilson Trucking Corp.,** 243 F.2d 212 (D.C. Cir. 1957); **see National Farmers Union Auto. & Cas. Co. v. Wood,** 207 F.2d 659 (10th Cir. 1953).

Except for **Lapiczak,** the foregoing cases arose prior to the 1966 amendment to Fed. R. Civ. P. 59(d), which amendment specifically authorizes a district court, after giving the parties notice and opportunity to be heard on the matter, to "grant a motion for a new trial, timely served, for a reason not stated in the motion." The 1966 amendment does not change the rule to be applied here for that amendment constitutes a change in the law granting authority to the trial judge to grant a new trial outside the limitation period for reasons initiated by the court, but only in the event a party has already served a motion for new trial. **Lapiczak v. Zaist,** *supra.* As explained in 6A

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danger by reason of his bus being driven onto the tracks in front of the oncoming train; (2) that defendant saw or had actual knowledge of plaintiff's presence at the crossing ahead; (3) that defendant knew and realized, in the situation in which it saw him, that plaintiff was in a position of peril or danger of being injured by defendant's train, or that defendant should have so known and realized in the exercise of ordinary care and prudence; (4) that after realizing plaintiff's peril or after such realization should have come to him in the exercise of ordinary care and prudence, there was time and defendant would have been able to have avoided the collision and plaintiff's injuries through the exercise of ordinary care; and (5) that thereafter defendant failed to use ordinary and reasonable care to stop or slow down its train and avoid the accident, and as a result thereof the collision and plaintiff's injuries occurred.

If you find that the plaintiff, Frank L. Peterman, has established all of the above propositions, numbered one through five inclusively, by a preponderance of the evidence, then you should find for the plaintiff under the doctrine of last clear

Moore's Federal Practice ¶ 59.01.[1] (1973), referring to the Notes of the Advisory Committee on Rules:

> Effective July 1, 1966, subdivision (d) was amended to empower the court to grant a motion for a new trial, timely served, by an order made more than 10 days after the entry of judgment, based upon a ground not stated in the motion, as well as grant a new trial on its own initiative within the 10-day period.

It is respondent's theory, however, that its filing of a motion for judgment n.o.v. under Fed. R. Civ. P. 50(b) empowered the court to grant plaintiff a new trial, even though the court found that the movant-railroad was not entitled to judgment in its favor. If a motion for judgment n.o.v. had been sustained, of course, Fed. R. Civ. P. 50(b) explicitly permits the court to "reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed." As the Supreme Court has said in **Cone v. West Virginia Paper Co.**, 330 U.S. 212, 215 (1947):

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chance. However, if the plaintiff has not established all of the above numbered propositions then you should find for the defendant railroad under this theory.

INSTRUCTION NO. 22

The law as to the elements of plaintiff's claim and defendant's affirmative defense has been set forth in prior instructions. The following questions are set forth merely to aid the jury in considering the various matters in a logical order, not to restate the law. You shall consider:

First: Was the defendant railroad negligent?

If your answer to that question is "no", you will return a verdict for the defendant on the plaintiff's claim against it. But if your answer is "yes", you then have a second issue to determine, namely:

Second: Was the negligence of the defendant the proximate cause of any injury to the plaintiff?

If your answer to that question is "no", you will return a verdict for defendant on plaintiff's claim against it. But if your

Rule 50 (b) contains no language which absolutely requires a trial court to enter judgment notwithstanding the verdict even though that court is persuaded that it erred in failing to direct a verdict for the losing party. The rule provides that the trial court "may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed." This "either-or" language means what it seems to mean, namely that there are circumstances which might lead the trial court to believe that a new trial rather than a final termination of the trial stage of the controversy would better serve the ends of justice. In short, the rule does not compel a trial judge to enter a judgment notwithstanding the verdict instead of ordering a new trial; it permits him to exercise a discretion to choose between the two alternatives.

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answer is "yes", then you must find the answer to a third question, namely:

Third: Was the plaintiff, Frank L. Peterman, negligent?

If you find the plaintiff was not negligent, having found in plaintiff's favor in answer to the first two questions, you should determine the amount of plaintiff's damages and return a verdict in plaintiff's favor for that amount. On the other hand, if you find the plaintiff was negligent, you must then find the answer to a fourth question, namely:

Fourth: Was the negligence of the plaintiff a proximate cause of any injuries he may have sustained?

If you find the answer is "no", having found in plaintiff's favor in answer to the first two questions, you will determine the amount of plaintiff's damages and return a verdict for plaintiff in that amount. On the other hand, if you find the answer is "yes", you have a fifth issue to determine, namely:

Fifth: Did the defendant railroad have the last clear chance to avoid the collision with plaintiff as defined in Instruction No. 21?

If your answer to this question is "yes", you will proceed to determine the amount of plaintiff's damages and return a verdict for plaintiff in that amount. If on the other hand, your answer is "no", you should return a verdict for defendant railroad.

But by its very terms, Fed. R. Civ. P. 50(b) does not apply where, as here, the court denies the motion for judgment n.o.v. See **Jackson v. Wilson Trucking Corp.**, 243 F.2d 212 (D.C. Cir. 1957).

Nevertheless, respondent continues, some courts and commentators have suggested that under Fed. R. Civ. P. 50(b), the trial court should be permitted to grant a new trial if the weight of the evidence is against the verdict although the evidence is sufficient to warrant denial of a judgment n.o.v. Judge (now Chief Justice) Burger writing in dissent in **Jackson v. Wilson Trucking Corp.**, expressed the view that a trial judge's discretion to grant a new trial in response to a timely motion for judgment n.o.v. ought not to be limited to cases where judgment n.o.v. could have been granted. He observed:

> In cases where a judgment n.o.v. is sought, it is almost a universal experience of practicing lawyers that 10 days will have elapsed from date of judgment before the court has an opportunity to decide whether or not final judgment should be entered in accordance with the motion. If, upon consideration of the motion briefs and oral argument, the trial court then concludes the evidence is legally sufficient, although contrary to the verdict, it is powerless, under the rule now announced, to grant a new trial, even though it is convinced that is the logical and practical relief. I cannot believe that such rigidities were contemplated by the Federal Rules * * *. [243 F.2d at 220-21.]

Professor Moore supports this viewpoint, commenting:

> For in that circumstance, the party opposing the motion would have been on adequate notice of a challenge to the sufficiency of the evidence. Certainly in this situation it would not be improper to deem a motion for new trial on the ground that the verdict was contrary to the great weight of the evidence to be included within the motion

for judgment n.o.v. [5A Moore's Federal Practice ¶ 50.11 (1971).]

See Note, 71 Harv. L. Rev. 552 (1958); **Note,** 33 Notre Dame Law 126 (1957); **Note,** 5 U.C.L.A. L. Rev. 954 (1957); **cf. Slaughter v. Philadelphia National Bank,** 290 F. Supp. 234 (E.D. Pa. 1968), **rev'd on other grounds,** 417 F.2d 21 (3d Cir. 1969).

But even if accepted as correct, the rationale suggested by Moore and the **Jackson** dissent—which rests upon the trial court weighing the evidence—does not support an affirmance here. A new trial was granted in the case at bar for a legal error in instructing the jury on the last clear chance doctrine. The respondent-Railroad cites no case or other authority as justifying the trial court's exercise of discretion in granting a new trial outside the 10-day limitation for such an error when the trial court has found the evidence itself sufficient to support the jury verdict.[3]

We find it quite apparent from the record submitted to us on appeal that the post-trial controversy between the parties centered on the question whether the evidence justified submitting the last clear chance doctrine to the jury. The defendant-Railroad squarely presented that question as one of law to the trial court. The trial court decided that issue of law against plaintiff-petitioner. Upon entry of the order denying judgment n.o.v., without any new trial order, such issue could have been expeditiously submitted for our review. The intervention of a new trial order, however, prevents and delays a final resolution of the lawsuit. In another case the author of this opinion said that federal courts and litigants therein ought not to bear the burden of repetitive trials unless absolutely necessary. General

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[3] The question of the sufficiency of the evidence to submit the last clear chance doctrine to the jury is not before us and we express no opinion on such issue.

Motors Corp. v. Lord, 488 F.2d at 1100-1101 (Bright, J., concurring).That admonition applies more forcefully here than in **Lord**—for here, neither litigant requested a new trial nor questioned the form and content of the instructions on last clear chance during the trial.

The writ of mandamus shall be issued vacating the new trial order and reinstating the judgment on the verdict.

A true copy.

Attest:

Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX "B"

In the United States District Court
Southern District of Iowa
Davenport Division

Frank L. Peterman,
Plaintiff,

vs.

Chicago, Rock Island and Pacific Railroad Company,
Defendant.

Civil No. 4-977-9.

RULING AND ORDER GRANTING NEW TRIAL

Defendant's Motion for Judgment Notwithstanding the Verdict came on for hearing September 11, 1973. Plaintiff appeared by his counsel, Lloyd E. Humpheys and W. Howard Smith. Defendant appeared by its counsel, Ben A. Webster.

Defendant claims it is entitled to Judgment NOV because (1) the jury in answer to a special interrogatory found plaintiff was guilty of negligence which was a proximate cause of the collision and (2) there was not sufficient evidence to submit the issue of Last Clear Chance to the jury.

The Court is of the opinion that under the evidence presented, the jury could have found that the train crew saw the bus when the train was about 1000 feet from the intersection. That the bus stopped about 55 feet from the centerline of the railroad track and then proceeded forward in low gear to the point of the accident. A stop sign was attached to a railroad cross buck sign about 35 feet from the centerline of the track. The bus proceeded past the stop sign and cross buck at a speed of about

six miles per hour. The train was traveling at a speed of about 55 miles per hour. No effort was made to slow the speed of the train until it was 25 to 100 feet from the crossing. The train hit the back four feet of the bus. The front of the bus would have had to travel 60 to 65 feet from the cross buck to the point of collision. This would have taken six or seven seconds and would have placed the train about 560 feet away from the crossing when the bus passed the cross buck. The engineer would have had six to seven seconds to slow the train down.

The Court does not believe under these circumstances it can hold as a matter of law that the train crew did not have the ability to avoid injury to plaintiff.

"It was not necessary, in order to avoid the collision, to stop the train before it reached the crossing. If its speed had been reduced just a little or a little sooner plaintiff could have crossed the railroad track in safety. If the train had reached the crossing just one second later than it did this collision would have been avoided. At least the jury could properly find. As it was, the truck [here bus] was partly across the track when it was struck without substantial reduction in the train's speed. * * *

"The fact the trainmen may not have had time, after realization of plaintiffs' peril to stop the train does not present operation of the last clear chance doctrine where the evidence indicates that had they checked the speed of the train it would have enabled plaintiff to clear the crossing." Tilgham v. Chicago and Northwestern Railway Co. (1962), 253 Iowa 1339, 1346, 115 N.W. 2d 165.

The jury could have found (1) the traincrew should have realized plaintiff did not know the train was approaching because he drove past the cross buck and (2) as reasonable men they should have, at that time, taken steps to slow down the train and (3) action at that time would have avoided the collision. Tilgham v. Railway, supra, at 1347.

The Court is of the opinion that defendant's motion for Judgment NOV must be denied.

However, at the hearing on September 11, the Court sua sponte questioned whether instructions 21 and 22 contained correct statements of the law on last clear chance and was inclined to feel that in the interest of justice a new trial should be granted on that ground. Parties were requested to submit briefs on this issue which have been filed. The matter is before the Court for its consideration.

The opening paragraph of Instruction 21 states: "Even if you have found the plaintiff guilty of negligence **which was a proximate cause of the collision** he might still recover under the doctrine of last clear chance."

Instruction 22 in effect stated that if the jury found plaintiff guilty of negligence **which was a proximate cause of the collision:** "You have a fifth issue to determine, namely:

"Fifth: Did the defendant railroad have the last clear chance to avoid the collision with plaintiff as defined in Instruction Number 21?"

The jury found plaintiff was guilty of negligence which was a proximate cause of the collision by answering special interrogatory number 2 "Yes".

In 1965 the legislature by statute removed from plaintiff the burden of pleading and proving he was free from negligence which contributed in any manner or degree to his injury and placed upon the defendant the burden of pleading and proving plaintiff's negligence was a proximate cause of the injury.

The viability of the last clear chance doctrine under the new statute was clearly established by the Iowa Supreme Court in Ackerman v. James (1972), 200 N.W. 2d 818. This case also treated last clear chance as an application of the law of proxi-

mate cause rather than an exception to the rule of contributory negligence.

"It would follow that if a trier of facts finds plaintiff's negligence was a proximate cause of his injury, he cannot recover." Ackerman v. James, supra, at 830.

It is therefore apparent that instructions 21 and 22 contain erroneous statements of the law and that under the correct law the general verdict is contrary to the jury's answer to interrogatory number 2.

The Court is of the opinion that these instructions and the interrogatories were confusing to the jury. It would not be fair or in the interest of justice to grant a judgment NOV because of the conflict between the general verdict and the special interrogatory in view of the erroneous instructions given. More properly the jury should have been told that plaintiff could recover even if he had been negligent if defendant's negligence intervened between his negligence and the collision and became the sole proximate cause thereof. The interrogatories should have separately inquired whether plaintiff was negligent, and, if so, whether his negligence was a proximate cause of the collision.

It Is Therefore Ordered that defendant's Motion for Judgment NOV is denied.

It Is Further Ordered that defendant shall have a new trial on all the issues in the case.

Signed this 9 day of October, 1973.

/s/ W. C. STUART
United States District Judge
Southern District of Iowa